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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-379

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN PRODUCTS CORP.,

Petitioners,

vs.

CALNETICS CORPORATION, MEIER-LINE, INC., R. W. C. SALES CORPORATION, ROLF W. CHRISTIANSEN, WILLIAM R. SACHKO, PHILLIP BALLINGALL, D. C. HARDING, D. N. EMANUEL, R. S. BELLER and F. E. EDWARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION.

This brief is submitted by respondents Calnetics Corporation and Meier-Line, Inc. (hereinafter collectively "Calnetics"), in opposition to the Petition for a Writ of Certiorari filed herein by petitioners Volkswagen of America, Inc. ("VW" or "VWoA"), and Volkswagen Products Corp. ("VPC").

Questions Presented.

Respondents submit that petitioners' Statement of Questions Presented is misleading because it is qualified with assertions of disputed or unproved facts and with

characterizations of the rulings below which do not accurately reflect the actual rulings. When such matters are excised from the questions, the legal issues presented by the Petition are:

I. Did the court below err in upholding summary judgment against counterclaims asserted under the Sherman Act where the *only* wrong alleged was the payment of commissions or rebates by the counterdefendant, Calnetics, to an agent of one of its customers?

II. Did the court below err in upholding summary judgment against one of the counterplaintiffs, VW, on the additional ground that it suffered no injury, where uncontradicted testimony of the party itself established that it suffered no compensable damage from the alleged commercial bribery?

III. Did the court below err in rejecting, on the ground that it was merely a species of the discredited *in pari delicto* defense, the contention that Calnetics' actual sales figures could not be used in its Sherman Act claims as a basis for calculating its damages because the sales allegedly reflected a separate commercial wrong of Calnetics?

IV. Did the court below err in holding that Calnetics' damage claim, under Section 7 of the Clayton Act, was not subject to summary disposition where the challenged acquisition was clearly followed by a loss of business to Calnetics, but the cause thereof was disputed, Calnetics asserting that it was the acquisition and subsequent anticompetitive conduct and defendants arguing that it was the cessation of a commission arrangement between Calnetics and an agent of one of its customers?

Statement of the Case.

The rulings challenged by the Petition arise from a private antitrust action filed by respondent Calnetics, a manufacturer of air conditioners designed for Volkswagen cars,[1] on September 28, 1970, in which VW and VPC, defendants therein, asserted antitrust and pendent counterclaims. Their defense to the suit, their counterclaims and the present Petition to this Court, all revolve around a charge that for about a one-year period, beginning in October 1968, Calnetics illegally paid commissions to a company owned in substantial part by an employee of defendant Volkswagen Pacific, Inc. ("VPI"), which was an independent distributor of Volkswagens and, at the time, a customer of Calnetics.

Respondents believe that petitioners have skewed their portrayal of this charge by treating some of their major allegations as though they were established fact, and by omitting even a mention of numerous salient facts on which the challenged rulings were based. Therefore, respondents submit the following statement of additional facts:

A. Basic Facts.

For several years prior to 1968, VPI purchased virtually all air-conditioning units for its cars from VW, the exclusive national importer of Volkswagen automobiles, which bought the units for resale from Delanair Engineering Company ("Delanair").

The Delanair units were so constantly defective and of such poor quality that VPI's management was forced

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[1]As used herein, the term Volkswagen refers to automobiles marketed under the Volkswagen, Porsche and Karmann Ghia brand names.

to search for alternative suppliers [Tr. 2058, 1059]. As early as 1965, VPI was encouraging Calnetics' predecessor to develop a more suitable air-conditioning system for Volkswagens [Tr. 770-73]. Calnetics' predecessor continued development of such a system with technological assistance from VPI, and in 1967 Calnetics began installing prototype units in Volkswagens, including some VPI field representative cars.

In the midsummer of 1968, VPI decided to discontinue the Delanair line and in September of that year announced that it would distribute Calnetics' "Meier-Line" systems to its dealers [Tr. 663]. This announcement was thus made substantially *prior* to the time, October 1968, when petitioners say that Calnetics entered into an agreement to pay a company owned primarily by Rolf Christiansen, VPI's service manager, commissions on sales to VPI and others (Pet. 2).

Moreover, VPI was not the only Volkswagen distributor which turned from the defect-ridden Delanair units distributed by VW to competitive units. In fact, nearly all distributors, with the exception of VW's wholly-owned subsidiaries, started purchasing competitive brands, including DPD (or "Delta") and Heatransfer [R. 1504-06]. Even VW's service manager admitted that the Meier-Line air conditioners were superior to the Delanair units, stating, "There is no question that . . . the unit, (Meier-Line) is, no doubt, superior to the presently marketed Delanair unit." [R. 1478, 1481].

Indeed, while the sale of Delanair units was "not a profitable item" in the first place because the expense of distributing them "would 'eat up' any anticipated profit" from marking them up on resale (532 F.2d 674, 688 (9th Cir. 1976)), VW incurred extraordinary and ever-increasing technical and service expenses on

these units in 1968 and 1969. In June of 1968, a VW liaison engineer had to be permanently stationed at Delanair's facility in Texas in order to cope with ever-mounting technical problems, and by January 1969, VW was forced to assume generally the service responsibilities for the Delanair units [R. 1497].

The inroads made by Calnetics and its competitors, DPD and Heatransfer, by negotiations with individual distributors acting independently, including a 10,000-unit purchase order from VPI to Calnetics [R. 1477], were what VW and Delanair feared and sought to prevent [R. 1486, 1490, 1492]. Their earlier monopolistic position of 85% had fallen to only 50%—a figure obviously not acceptable [R. 1521]. VW had already commenced a program of threatening the disallowance of warranty on Volkswagens equipped with Meier-Line units [R. 1477]. It had already taken over the service responsibilities for Delanair [R. 1497]. Yet, the prospect of Delanair regaining its earlier markets on the merits was not promising. VPI's parts manager (a person not connected at all with the alleged Christiansen "bribe"), for one, told a Delanair representative that he had no present intention of renewing dealings with Delanair, and that if Meier-Line should fail them, they would probably take a look at DPD [R. 1500-01]. Something had to be done.

On September 26, 1969, VW acquired Delanair [R. 1499]. The "deep pocket" of VW was now injected into a market composed of relatively small, struggling entrepreneurs. VW infused Delanair with a $575,000 interest-free loan [Tr. 792]. The acquired company's line of credit was guaranteed by its enormously wealthy parent [Tr. 789-93, 871, Ex. 414]. An entire management team was transferred from VW to Delanair, and

a strong technical field force was added [Tr. 751, 779, 871-72]. Delanair's "bad name" was replaced with the family name Volkwagen Products Corp. ("VPC") [Tr. 787-88, 967, Ex. 240]. A massive, nationwide, advertising campaign promoting the concept that "Volkswagen is now in the air-conditioning business" commenced, and intensive sales meetings with distributors were conducted by an entourage of both VW and VPC officials [Ex. 567]. In addition, these exertions of deep pocket muscle were accompanied by a program to disparage Meier-Line, which included statements that Meier-Line's product was inferior and that it did not honor warranties [R. 1515].

Even prior to the acquisition, VW had made known to Volkswagen distributors its exclusionary philosophy that only one brand of air conditioners should be available to the Volkswagen organization [Ex. 410], and it clearly viewed the purchase of Delanair as "an important step" in implementing this exclusionary ideal [Ex. 235]. On the very day of the acquisition, VW began to solicit its distributors' "fullest support of this new endeavor" [Ex. 231; R. 1499].

The effects of the cumulative pressures flowing from the acquisition were not lost on VW's distributors and dealers, who were downstream on a distribution chain controlled by VW and committed by franchise agreements to use their "best efforts to promote the sale of VW parts" [Exs. 370, 370A, 370B]. As VPC's competitors discovered, the attitude of dealers and distributors was that "as long as it is in a VWoA box, I will buy it" [Tr. 967]. They just did not want the "aggravation and hassle" that VW could give them for buying a non-Volkswagen product [Tr. 1194]. ". . . [T]hey had their own company and really wasn't [sic]

interested" in dealing with outside suppliers [Tr. 934]. Thus, even though VPI's President told VW after the acquisition that he was "satisfied" with his present suppliers, which included Calnetics [Tr. 877-88, 885], VPI came around, promised VW and VPC that it would "join" their "marketing efforts," cancelled its 10,000-unit order with Calnetics, replaced it with a 1,500-unit order, eventually cancelled that, and finally went with VPC "one hundred percent" [R. 787, 1511, 1512, 1515].

It took about a year of constant changes before VW felt VPC was "back on the right track" and could fulfill all the Volkswagen distributors' requirements [Tr. 764-66]. But once it was, VW's single supplier philosophy was realized; with VPC, VW had effectively foreclosed once growing competitors from the market while itself leap-frogging to a virtual monopolist's control of 71% of the air-conditioner sales for its Volkswagen automobiles. 348 F.Supp. 606, 613, 620-21 (C.D. Cal. 1972), referencing the proven market shares.

B. Proceedings Below.

In September 1970, Calnetics brought suit for damages and equitable relief against VW, VPC and VPI, charging them with conspiring to restrain and monopolize trade and commerce in the manufacture, distribution and sale of air conditioners designed for Volkswagen automobiles, in violation of Sections 1 and 2 of the Sherman Act, and charging VW with acquiring Delanair (VPC) in violation of Section 7 of the Clayton Act. VW and VPC entered counterclaims on the theory that Calnetics' commission arrangement with Christiansen violated Sections 1 and 2 of the Sherman Act, Section 2(c) of the Robinson-Patman Act and state tort laws.

All claims, except Calnetics' Section 7 claims for equitable relief, were disposed of, adversely to the respective complainants, by summary procedures. Based on trial of the facts set forth above, together with statistical evidence of VPC's vault to domination, the court held the acquisition illegal under Section 7 and ordered divestiture and other equitable relief. 348 F. Supp. 606 (C.D. Cal. 1972); 353 F.Supp. 1219 (C.D. Cal. 1973).

On appeal, the Ninth Circuit affirmed the summary judgment against VW's and VPC's Sherman Act claims on two grounds: (1) their claim of commercial bribery, standing alone, did not constitute a violation of the Sherman Act (532 F.2d at 687); and (2) VW could not establish any damages flowing from the alleged commission agreement. *Id.* at 688.

The Ninth Circuit reversed the grant of summary judgment against Calnetics' Sherman Act claims. First, it said, the district court overlooked a genuine issue of fact whether the alleged commission agreement was at all causally connected to Calnetics' sales to VPI, as VW and VPC themselves conceded in their briefs (*id.* at 688 n. 22). Second, it found that the lower court's absolute bar on the use of "illegal sales" to prove damages granted credence to a discredited *in pari delicto* or "unclean hands" defense. *Id.* at 688-89. The circuit court rejected the defense with the knowledge that, if its hands were dirty, Calnetics would be separately liable for its own misconduct. *Id.* 689.

The Ninth Circuit also reversed the directed verdict against Calnetics' Section 7 damage claim. It observed that the district court did not clearly indicate the facts on which it based its lack-of-causation finding and that, based on the evidence presented, there was a genuine issue on causation. *Id.* at 684-86.

REASONS THE WRIT SHOULD NOT BE GRANTED.

Petitioners' argument for this Court's review of their case is couched in terms of the evils of "commercial bribery" and the horrors of allowing bad men to recover for wrongs done them. Structured in this way, their argument almost systematically ignores the facts that: (a) there are legal proscriptions on commercial bribery and channels for vindicating losses occasioned by it, including the federal Robinson-Patman Section 2(c) and state tort laws; (b) there has been no adjudication that the respondents herein have harmed the petitioners or their businesses; and (c) as the Ninth Circuit recognized, "Calnetics is itself not immune from liability," and neither should petitioners be.

Atmospheric coloration aside, the specific issues raised by the Petition do not warrant review by this Court on certiorari because, properly drawn, each was correctly decided by the Ninth Circuit *on the basis of the facts* developed in the case, in accordance with prevailing principles of law previously articulated by this Court and others, and without conflict with the rules enforced in other circuits.

I

The Ninth Circuit's Ruling That VW's and VPC's Charges of Commercial Bribery Were Not Cognizable Under the Sherman Act Was Soundly Based on Well-Established Precepts of the Scope of the Sherman Act.

The Ninth Circuit did not uphold summary judgment against VW's and VPC's Sherman Act claims *because* they were "based on conduct motivated by commercial bribery" (Pet. 16) but because they constituted nothing

more than a claim of commercial bribery, specifically a claim that a single seller granted a commission to the agent of a single buyer. 532 F.2d 674. Nor did the court hold, or even imply, that commercial bribery and the Sherman Act are "mutually exclusive" (Pet. 17), or that, "[i]f a restraint of trade or attempted monopolization incorporates commercial bribery, it lies outside the Sherman Act." (Pet. 19). To the contrary, the Ninth Circuit specifically noted that:

> "This case does not present the question, nor do we here decide, under what circumstances a claim of commercial bribery tied to claims of other acts tending to restrain trade would state a cause of action under §§ 1 and 2 of the Sherman Act." 532 F.2d at 687 n. 20.

It is only by ignoring this limitation that petitioners are able to make the exaggerated mischaracterizations quoted above. By the same token, it is only by ignoring this limitation that petitioners are able to construct an artificial conflict with other circuits which have studied claims involving aggregations of numerous unfair business practices, undertaken on a concerted basis by competitors, for possible Sherman Act violations. *E.g., George R. Whiten, Jr. Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). Indeed, not one of the purportedly conflicting decisions cited by the petitioners (Pet. 19) was based on a *solitary* claim of "commercial bribery."

As petitioners' own discussion of their allegations discloses (Pet. 17), their case, unlike those they cite

for support, clearly did present only a solitary claim of commercial bribery yoked to conventional antitrust language with the *ipse dixit* that the one equals the other. In ruling that this alleged "commercial bribery, standing alone, does not constitute a violation of the Sherman Act" (532 F.2d at 687), the court was applying well-established and well-reasoned precepts of the proper ambit of the Sherman Act. The very case which VW and VPC invoked to support their bribery claim under Section 2(c) of the Robinson-Patman Act articulately enunciated these principles, within the framework of prior federal decisions:

> "The evidence here proves only bribery of an influential state employee which had a detrimental restraining effect upon interstate commerce. ***This is not the type of misconduct within the purview of the concepts of a combination in restraint of trade or monopoly as used in the Sherman Act.*** This case falls within the principles found controlling in *Parmelee Transportation Company v. Keeshin*, (7 CCA 1961), 292 F.2d 794, where the Court said, 'However, *the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act*, even though such wrongs be actionable, under state law.' That Court quoted extensively from *Apex Hosiery Co. v. Leader*, 1940 (1940-1943 Trade Cases ¶56,039), 310 U.S. 469, in which the Supreme Court announced that *the Sherman Act must be interpreted in the light of well understood common law doctrines relating to monopolies and restraints of trade. . . . Nothing of that kind occurred here. This is a simple case*

> *of buying influence, sometimes called commercial bribery,* which is cognizable under the antitrust laws only because of the specific language of 15 U.S.C. 13(c) and the judicial applications of the section we have noted. The case falls short of proving actionable wrongs under the Sherman Act. Cf. *Norville v. Globe Oil & Refining Co.,* (7 CAA 1962), 303 F.2d 281." *Sterling Nelson & Sons, Inc. v. Rangen, Inc.,* 235 F.Supp. 393, 399-400 (D. Idaho 1964), *aff'd on other grounds,* 351 F.2d 851 (9th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966) (emphasis added), quoted in part 532 F.2d at 687.

This Court has similarly recognized that the Sherman Act is not a panacea for every commercial wrong, and especially not for a single actor's attempt to purchase the influence of another. As the Court observed with respect to such allegations in *United States v. Boston & Maine Railroad,* 380 U.S. 157, 162 (1965):

> ". . . it is doubtful that this indictment, as illuminated by the bill of particulars, alleges anything more in substance than a bribe. Bribery might well be in the family of offenses covered by a conflict of interest statute. But it is more remote from an antitrust frame of reference."

To say, in this fashion, that bribery standing alone does not state a Sherman Act claim is not to approve of bribery, but to place it rationally in the appropriate family of wrongs. This the Ninth Circuit has done, for it recognized, *inter alia,* the propriety of petitioners' claim under the Robinson-Patman family of pricing violations. 532 F.2d at 679.

II

Summary Judgment Was Properly Entered Against VW on the Basis of Uncontradicted Testimony That It Could Demonstrate Any Damages Resulting From the Alleged Commercial Bribery.

VW's challenge to the second ground for affirmance of summary judgment against it, that it "could not establish any damages flowing from the alleged Christiansen-Distributor commission agreement" (523 F.2d at 688), is a belated attempt to circumvent its failure to contradict, or even present evidence on, the undisputed facts on which that finding was based.

As VW knows from the cases it cites, "In awarding damages for loss of profits, net profits and not gross profits are the proper measure of recovery." *Distillers Distributing Corp. v. J. C. Millett,* 310 F.2d 162, 164 (9th Cir. 1962) (cited in Pet. 21). As VW also knows, the record below contained uncontradicted testimony that "in reselling Delanair units VW made no net profit" (Pet. 21) and that really it suffered no compensable damages at all by virtue of VPI purchases from Calnetics in 1968 and 1969, when the commission agreement was in effect. 532 F.2d at 688.

VW's President testified on several occasions that the distribution of air conditioners was not a profitable business and, as the Ninth Circuit noted, "that VW's expenses in distributing Subsidiary units would 'eat up' any anticipated profits resulting from buying them at one price and reselling them at a higher price." *Id.*

VW has never made any effort to present any *evidence,* credible or otherwise, contradicting either this testimony or any of the other evidence of rapidly

escalating technical and service assistance costs. Instead, it presented both courts below and now this Court, with a lawyer-contrived argument that the enormous and ever-increasing expenses VW incurred in the distribution of air conditioners were, in some unexplained manner, "in the nature of fixed costs" or overhead and that gross profits can, therefore, be awarded as representing net profits (Pet. 21 citing *Distillers Distributing Corp., supra*). This argument is predicated solely on a VW lawyer's attempt to discredit the President's testimony by means of the lawyer's own factually unsupported, non-evidentiary assertion that expenses were such that they would not really eat up anticipated profits (Pet. 21, n. 11). Clearly, a lawyer's statements cannot be used to contradict the factual record. Since VW chose to rely on its lawyer's characterizations rather than competent testimony on specific facts challenging the record, the Ninth Circuit quite properly concluded, "VW has failed to point to any evidence tending to show . . . a genuine issue. . . ." 532 F.2d at 688.

Finally, in an apparent attempt to create a sympathetic environment for yet another appellate review of this failure, VW claims a "square conflict" with *Terrell v. Household Goods Carrier Bureau*, 494 F.2d 16, 23, n.12 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 987 (1974) (Pet. 22). Even a cursory reading of *Terrell* reveals that the court never even contemplated giving a plaintiff damages for "lost profits" if, as was the case here, the record provided no basis whatsoever for recovery of compensable damages. To the contrary, the court in *Terrell* was reviewing a certified public accountant's projected "net profit analysis based on

actual known expense figures and the actual and projected sales figures" adduced by a marketing expert. *Id.* at 16. This analysis showed that, had it not been run out of the market, the plaintiff would have made significant profits in the years for which damages were claimed.[2]

The only analysis made here, that of VW's own President, states that VW would not have done so. Even the most generous court cannot provide "lost profits" where the uncontradictory and sole testimony establishes that there were none. Having chosen not to present evidence to impeach the testimony of its own President, VW cannot be heard to complain here.

III

The Ninth Circuit's Holding That an Antitrust Plaintiff Can Use Actual Sales, Even if Illegally Obtained, as a Basis for Damages Is Consistent With This Court's Mandate That Antitrust Defendants Not Be Permitted to Escape the Effects of Their Proven Wrongs.

For years now, it has been the established policy of this country that an antitrust violator cannot be permitted to avoid accounting for his wrong by pointing an accusing finger back at the plaintiff. As this Court stated in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968):

> *"The plaintiff who reaps the reward of treble damages may be no less morally reprehensible*

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[2]Since the plaintiff had never actually made a profit, the court insisted that its projection be reasonably based on proven facts but stipulated that if they were, the red ink of plaintiff's history could not be used to limit it to its zero "going concern value" at the time of its demise.

> *than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.* A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." (Citations omitted.) (Emphasis added.)

Petitioners' argument that Calnetics should not be allowed to predicate a damage calculation on its actual sales, because the sales were obtained illegally, overtly turns on a directly conflicting view. It criticizes the Ninth Circuit for having "encouraged" the suit of a morally reprehensible plaintiff (Pet. 27), even though *Perma Life* explicitly rejected this reasoning and even though the Ninth Circuit explicitly noted that "Calnetics is not itself immune from liability" for its separate commercial wrongs. 532 F.2d at 689.

Admittedly, petitioners try to distinguish their argument from the *in pari delicto* and "unclean hands" defenses discredited by *Perma Life* and its progeny,[3] but they do so by retreating to earlier authorities that *Perma Life* necessarily superseded and by develop-

[3]*E.g., Semke v. Enid Automobile Dealers Ass'n,* 456 F.2d 1361 (10th Cir. 1972); *Adolph Coors Co. v. A&S Wholesalers, Inc.,* 1975-1 Trade Cas. ¶60,187 (D. Colo. 1975); *Purex Corp. v. General Foods Corp.,* 318 F.Supp. 322 (C.D. Cal. 1970).

ing a conceptualistic distinction that is different only in semantic form from the defenses invoked in *Perma Life* and the cases following it (Pet. 23-26).

Thus, petitioners assert that the measure of Calnetics' damages must be the difference between what did happen as a result of their restraint and what would have happened in a 100% pure, competitive market (Pet. 23-24). But it is clear from *Perma Life, supra,* that and the cases under it, that the proper measure of damages is the difference between what did happen as a result of defendants' restraint and what would have happened in the absence of *that restraint*. Indeed, this is nothing more than an expression of the familiar "but for" rule of tort liability and the principle that one takes his victim as he finds him.

Petitioners also assert that *Perma Life* and its progeny deal only with standing while their argument deals with proof of damages. But virtually any *in pari delicto* or unclean hands argument can be constructed in this way. For example, the argument in *Semke v. Enid Automobile Dealers Ass'n,* 456 F.2d 1361 (10th Cir. 1972), that the plaintiff should not be allowed to recover damages because, having failed to obtain a state license, his whole business "operation" was illegal could just as easily have been framed as an argument, that his separate commercial wrong rendered each of his sales illegal, and hence inadmissible to prove damages. Whether argued in terms of standing or terms of damage evidence, the facts are the same. The results—preclusion of a plaintiff's recovery and exonera-

tion of the defendant—are the same. Only the dialectics are different. Most importantly, since this kind of game can be played with any plaintiff's ethics, the net effect of the petitioners' approach would be to seriously undermine *Perma Life* and, with it, the usefulness of the private antitrust action. Therefore, as the Ninth Circuit aptly recognized:

> "Labels, however, are not controlling, and we find no legitimate reason for distinguishing defendants' 'illegal sales' argument from the *in pari delicto* type of defense struck down in *Perma Life*." 532 F.2d at 689.

IV

In View of Conflicting Evidence on Calnetics' Section 7 Claim as to the Reasons Why Calnetics Was Terminated at a Supplier of Air Conditioners for Volkswagens, the Ninth Circuit Properly Reversed a Directed Verdict Based on an Asserted Lack of Causal Nexus Between VW's Acquisition of VPC and the Termination of Calnetics.

The established standard for a review of a directed verdict is that the evidence, including all reasonable inferences of fact, must be viewed in the light most favorable to the party against whom the verdict was made. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 694 (1962).

Were VW to meet this standard, it would have to grapple with the evidence, detailed above, that: VPI's decision to buy Calnetics' air conditioners preceded any commission agreement and was precipitated by the expectation that Calnetics' units would outperform the disastrously defective Delanair units; that even VW thought Calnetics' units were superior to Delanair's; that VW pursued one brand of philosophy and, therefore, denigrated Calnetics and its products; that VW enjoyed a special position of power by virtue of its franchisor/supplier relationship with distributors such as VPI; that VPI was satisfied with its ouside suppliers until after VW acquired Delanair, infused it with VW money and personnel and subjected distributors to a barrage of pressures to buy in house; that VW and VPC obtained VPI's promise to join their marketing efforts after which VPI cancelled orders with Calnetics; that VPC's units, considered unfit when marketed under the name Delanair, made substantial inroads into the sales areas in which competitors had been growing; that competitors who made no alleged "bribes" were also cut back or excluded from the market after VPC was put "back on the track" by its deep pocket parent; and that VPC quickly attained an incipient, if not complete, monopoly.

But VW does not face this evidence. Instead, it views the evidence most favorably to itself. It ignores every item of this evidence that Calnetics' loss of sales resulted from the lessened competition and incipient monopoly effects of the acquisition. It ignores the Ninth Circuit's listing and discussion of undisputed evidence suggesting that the ouster of Calnetics was a direct by-product of a conspiracy to restrain trade. 532 F.2d at 682-85. It then erroneously asserts that "Calnetics

offered no evidence" of an injury causally related to VW's acquisition of VPC or to the anticompetitive effects thereof (Pet. 29).

Thus eliminating the negative, VW accentuates the positive by presenting as established fact its current theory that Calnetics only obtained sales to VPI as a result of the commissions to Christiansen's corporation and that it lost the sales because Christiansen was dismissed from VPI's employ (Pet. 27-28).

By framing its argument in this one-sided fashion, VW effectively proves the propriety of the Ninth Circuit's ruling. There are at least two theories as to the cause in fact of the ouster of Calnetics and, on the present state of the records, neither is so remote that a jury could not reasonably believe it and neither so unimpeachable that a jury could not reasonably doubt it.

Moreover, the circuit court's concern that the parties' conflicting causation arguments be resolved by a jury cannot fairly be read as an endorsement of the view that a Section 7 plaintiff can recover damages without proving the fact of causally related injury or that VW will be liable for every business casualty that followed its acquisition of VPC (Pet. 25-26), for the court clearly indicated that Calnetics must prove "damages resulting from the acquisition" and "the fact, if it is a fact" of unlawful market foreclosure. 532 F.2d at 685. The court merely did what it was compelled to do in the face of a major factual dispute, remand the matter for trial.

Conclusion.

For the foregoing reasons, respondents respectfully submit that the Petition should be denied.

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Respectfully submitted,

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